NO. 83-969

In The

Supreme Court of the United States

October Term, 1983

MILTON LUBIN,

Petitioner,

vs.

CRITTENDEN HOSPITAL ASSOCIATION, A Corporation; R. F. SCRUGGS; HUGH B. CHALMERS; J. F. RIEVES, JR.; H. G. LANFORD, M.D.; E. W. BIGGER, JR.; JOHN H. GOE; RALPH HILL; C. E. MORRISON, JR.; SAM C. HUDSON; N. S. SECHREST; BILLY WOOD; and, MRS. MARY ARNOLD,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court review a decision of the United States Court of Appeals for the Eighth Circuit affirming that the District Court had no jurisdiction under 42 U.S.C. § 1983 because the imposition of a probationary period upon a Caucasian staff physician by a private hospital association was not state action?

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Respondents, Crittenden Hospital Association, et al (hereinafter "Crittenden Hospital" or "respondents") respectfully request that this Court deny the Petition for Writ of Certiorari seeking to review the judgment and

opinion of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

Contrary to the statement of Petitioner, the opinion of the Eighth Circuit is reported as *Lubin v. Crittenden Hospital Association,* 713 F.2d 414 (1983); it is reproduced at Appendix B-3 through B-10 of the Petition. The opinion of the United States District Court for the Eastern District of Arkansas has not been reported; it is reproduced at Appendix A-1 through A-2 (sic) of the Petition.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

REASONS FOR DENYING THE WRIT

Petitioner requests that this Court issue a Writ of Certiorari based on Rule 17(a) and (c). An examination of the alleged reasons for review shows clearly that the Eighth Circuit opinion is not in conflict with decisions either of this Court or the other Circuits.

I. The Opinion Below Is Not In Conflict With Applicable Decisions Of This Court.

Although Petitioner claims that he is invoking Rule 17(c) and says that the Eighth Circuit decided a most important question of Federal Law which should be settled by this Court (Petition, p. 13), he then ignores that assertion and proceeds to argue that, in fact, the Eighth Circuit opinion decided a federal question in a way that is in conflict with applicable decisions of this Court. (Petition, p. 15). Quite to the contrary, the opinion is in accord with the decisions of this Court and the opinion relied upon such precedents in affirming the District Court.

Petitioner first admits that the Eighth Circuit opinion followed *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), in finding that there was not a sufficiently close nexus between the challenged action of the Hospital and the state's regulation of the institution. (Petition, p. 15).

He then goes on to suggest that if the Eighth Circuit had followed *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), "it would have easily found that a symbiotic relationship existed between the Respondents and government sufficient to provide a basis for finding State Action." He further criticizes the Eighth Circuit for commenting in its opinion that the "use of the symbiotic relationship test is limited generally to cases involving racial discrimination." (Petition, p. 15).

Burton did involve racial discrimination and the case at bar does not. Other courts have also noted that the doctrine of state action in racial discrimination cases was necessarily broadly drawn in order to implement Congressional intent. See Footnote 3, *Briscoe v. Bock*, 540 F.2d 392, 396 (8th Cir. 1976); *Greco v. Orange Memorial Hospital Corp.*, 513 F.2d 873 (5th Cir.), cert. den., 423 U.S. 1000 (1975).

The absence of racial discrimination is not the only significant factual distinction between *Burton* and the medical privileges probationary action taken by Crittenden Hospital against Dr. Lubin. Even though there was the usual state and federal regulation of health care and participation in Medicare and Medicaid programs, as well as local government ownership of the land and building, the court observed that "the lease agreement affords full and complete charge of the management and operation to the Hospital."

In *Burton* the parking authority profited from the admitted racial discrimination of the restaurant and the parking authority became a joint participant and thus responsible for the discrimination because of the manner in which it leased the public property. 365 U.S. at 726.

Jackson pointedly limited *Burton* to its specific facts, just as Justice Clark, 13 years before, had suggested should be the case. 419 U.S. at 358.

In the last two years this Court has measured two separate fact situations in light of the symbiotic relationship presented in *Burton*, and rejected the contention as a basis for state action. *Rendall-Baker v. Kohn*, — U.S. —, 102 S. Ct. 2764 (1982); *Blum v. Yaretsky*, — U.S. —, 102 S. Ct. 2777 (1982). The *Blum* court recited the litany of alleged state involvement and regulation, pointed out that the State was not responsible for the decisions challenged, held that the challenged activities "do not fall within the ambit of *Burton*", and bottomed its decision on *Jackson*.

The Eighth Circuit correctly decided the question presented in this case in keeping with principles set forth in prior, applicable decisions of this Court. Petitioner has not, and cannot, demonstrate that the decision of the

Eighth Circuit conflicts in any way with an opinion of this Court so as to justify review by certiorari.

II. The Eighth Circuit's Decision Is Not In Conflict With Decisions Of Any Other Federal Courts Of Appeal

Petitioner claims that the Eighth Circuit decision, which was in accord with the Fourth, Fifth, Seventh and Tenth Circuits, is in conflict with the Third and Sixth Circuits. (Petition, p. 16). A review of the current decisions of those two circuits demonstrates that petitioner is in error.

The Third Circuit

Petitioner says that *Chalfont v. Wilmington Institute,* 574 F.2d 739 (3rd Cir. 1978) is in conflict but neither discusses the case nor gives any reasons for the claim. (Petition, p. 16). This is perhaps because *Chalfont* involved a discharged employee of a public library and thus the court was presented with a different issue.

The Third Circuit by its decision three months later in *Hodge v. Paoli Memorial Hospital,* 576 F.2d 563 (1978) did consider revocation of the staff privileges of a physician in a private hospital and, with similar facts before it, concluded that the receipt of federal funds and state regulation did not constitute state action under 42 U.S.C. § 1983. It listed the Eighth Circuit decision of *Briscoe v. Bock,* 540 F.2d 392 (1976) as one of the circuits holding to a similar view.

The Sixth Circuit

Petitioner points to *O'Neill v. Grayson County War Memorial Hospital,* 472 F.2d 1140 (6th Cir. 1973) to support his assertion that the Sixth Circuit is in conflict with the Eighth and other Circuits. *O'Neill* was decided a year

before this Court's 1974 decision in *Jackson v. Metropolitan Edison Co., supra,* which formulated the nexus test on which the Eighth Circuit relied in *Briscoe* and in the instant case.

The Sixth Circuit in *Jackson v. Norton Children's Hospitals, Inc.,* 487 F.2d 502 (6th Cir. 1973), cert. den. 416 U.S. 1000 (1974) where a physician claimed a § 1983 violation against a private hospital, found that the revocation of staff privileges did not constitute state action.

Again in 1980, the Sixth Circuit, considering the principles of both *Burton* and *Jackson,* found no symbiotic relationship and an insufficiently close nexus to constitute state action. *Griffith v. Bell-Whitley Com. Action Agency,* 614 F.2d 1102 (6th Cir.), cert. den. 447 U.S. 928 (1980). See also *Newsom v. Vanderbilt University,* 653 F.2d 1100 (6th Cir. 1981).

It, therefore, seems clear that the Sixth Circuit is following the same guidelines and mandates of this Court as the Eighth Circuit and that there is no conflict which justifies review by certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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